

NOV 21 1991

In The
Supreme Court of the United States OF THE CLERK
October Term, 1991

HOWARD WYATT,
Petitioner,

vs.

BILL COLE and JOHN ROBBINS, II,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONER

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November 21, 1991

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QUESTION PRESENTED

Do private persons, who initiate use of an unconstitutional statute, have available the qualified immunity of public officials?

PARTIES TO THE PROCEEDING

In addition to the Petitioner, Howard Wyatt, and the Respondents, Bill Cole and John Robbins, II, the remaining Defendants below, who are all governments or governmental officials, were: Rankin and Simpson Counties, Mississippi; J.B. Torrence; Lloyd S. Jones; Wiley Magee; Cindy Jenson; Ernest E. Smith; Ray Roberts; and Michael Moore, in his official capacity as Attorney General of the State of Mississippi. The only Defendants now before this Court are the private persons who initiated the unconstitutional procedure, Respondents Cole and Robbins.

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On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the United States District Court, holding the Mississippi replevin statute unconstitutional, is reported at 710 F. Supp. 180, and is reprinted in the Joint Appendix ("J.A.") at 3-9. The unreported decision of the United States District Court, holding that the individual Defendants are entitled to good faith immunity, is reprinted at J.A. 10-19. The opinion of the United States Court of Appeals for the Fifth Circuit holding that the private Defendants are entitled to immunity, is reported at 928 F. 2d. 718, and is reprinted in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") 13a-37a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit

entered judgment on April 17, 1991. The Petition for Writ of Certiorari was filed on July 16, 1991, and was granted on October 7, 1991. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The federal statute involved is 42 U.S.C. § 1983, which provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects or causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In July, 1986, Petitioner, Howard Wyatt, and Respondent, Bill Cole, were partners in the cattle business. Pet. App. 19a. Cole wanted to break up the partnership, and discussed this with Wyatt, but the two could not reach an agreement. Cole then obtained the services of Respondent, John Robbins, II, an attorney. Pet. App. 19a.

Attorney Robbins, on Cole's behalf, effected a division of the partnership property by using the Mississippi replevin statute. See Pet. App. 19a. This statute permits one to obtain property in possession of another by swearing to a state court judge that he is entitled to that property, and that his adversary "wrongfully took and detains the property". Pet. App. 20a n.1, quoting Miss. Code Ann., § 11-37-101. Upon receiving such a sworn statement and upon the posting of a bond, the state replevin statute provides that the state court judge "shall" order the "replevin" of the property to the Plaintiff prior to notice or opportunity for a due process hearing. *Id.*

Pursuant to this replevin statute, Respondents obtained a Writ of Replevin from a state court judge. J.A. 4. This replevin

order directed the county sheriff to seize, without prior notice or hearing, some of the partnership cattle and other property from the Petitioner. J.A. 4. On July 25, 1986, pursuant to the replevin order obtained from the Circuit Judge, the Respondents accompanied several county law enforcement officers to Petitioner's property for the purpose of seizing the property. Pet. App. 19a. Wyatt begged the officers and Respondents not to take the property since he "owned an interest in the cattle" and he "had not had any kind of summons or hearing in court." Affidavit of Howard Wyatt, Record at ("R.") 1143-44. Petitioner also told Respondents and the law enforcement officers that running the cattle in the July heat would ruin them. R. 1143. However, the officers and Respondents ignored Petitioner's protests and

caused the cattle to be chased with horses and dogs throughout the fields and fences in spite of all (Wyatt's) efforts to prevent them. . . . As a result of this conduct (Wyatt) had to consult a psychiatrist and . . . was hospitalized and treated by a psychiatrist at the Riverside Hospital in Jackson, Mississippi.

R. 1143-44. Respondents and the officers finally captured 23 head of cattle, as authorized by the Writ of Replevin.¹ Cole kept the cattle for a short time in Mississippi, then took them to Texas. R. 1234-36. On October 1, 1986, a post-seizure replevin hearing was held by the state court judge, who ordered the complaint in replevin to be dismissed, and ordered the property returned to Petitioner. Pet. App. 20a. Cole, however, declined to follow the state court order. J.A. 5. Rather than pursuing Cole in the state courts, Petitioner commenced this action in the United States District Court for the Southern District of Mississippi, with jurisdiction based on 28 U.S.C. § 1331. J.A. 4. The complaint alleged that the Mississippi replevin statute offends due process, and it sought injunctive relief and damages against Respondents and the governmental actors who caused this hearingless seizure. R. 1. On April 13, 1989, the District Court entered its Memorandum

¹The Writ directed a seizure of 23 head of cattle, but left it to the officers' discretion to decide which cattle were to be seized.

dum Opinion and Order holding the Mississippi replevin statute unconstitutional as denying due process. J.A. 8-9.

On August 10, 1989, the District Court entered its Memorandum Opinion finding that the governmental officers were all entitled to a "good faith" defense, and finding that the local governments were acting as state agencies at the time in question and were, thus, immune. J.A. 15-18. The District Court also found that the private Defendants (Robbins and Cole) were also entitled to the same qualified immunity as were the governmental Defendants. J.A. 13-14. Because this qualified immunity would not apply to acts done following the date the statute was declared unconstitutional, a trial was held on the sole issue of whether any damages that might have accrued since that date. See Pet. App. 21a. At the trial, Petitioner conceded that he could not prove that any damages had accrued since the statute was declared unconstitutional. All of his damages consisted of deterioration in the value of the remaining herd caused by chasing them in the hot July heat,² and the mental stress³ caused by having his property seized without a hearing, all of which occurred before this action was begun.⁴

Petitioner appealed the District Court's denial of damages to the Fifth Circuit, which agreed with the District Court's finding that all Defendants, including the private Defendants, are immune from damages. Pet. App. 25a-26a. In addition, the Court immunized Respondents from paying any portion of Petitioner's attorneys' fees in obtaining the declaration that the replevin statute was unconstitutional on the ground that the Defendants' good faith immunity prevented liability for the fees as well. Pet.

²Testimony at trial was that "Brahman" cattle become mean and unmanageable if they are mistreated, such as occurs when they are chased with horses and dogs. Transcript at 61-62.

³Mental stress is compensable as an item of damages for a denial of due process. *Carey v. Piphus*, 435 U.S. 247, 262-64 (1978).

⁴Petitioner's counsel had previously determined the bond given by Cole was uncollectible.

App. 27a.

SUMMARY OF THE ARGUMENT

It is now the law of this case that Petitioner's constitutional rights were violated and that this violation caused him great harm. His property was seized without any notice or opportunity for a hearing, and the remainder of his herd was chased with horses and dogs in the hot July heat, thereby causing them to lose value. The hearingless seizure also caused Wyatt to suffer psychiatric trauma, necessitating hospitalization. He was unable to recover any of his damages because of the worthless state court replevin bond. Even though 42 U.S.C. § 1983 appears to grant Petitioner a remedy in damages for this violation of his constitutional rights, both lower courts denied Petitioner any remedy by extending the qualified immunity afforded to public officials to private actors who initiate the use of an unconstitutional statute.

Petitioner should not be deprived of that remedy by extending the qualified immunities enjoyed by government officials to private actors. The statute does not provide for this protection, and neither the common law nor the purposes of 1983 support this extension. Moreover, none of the policy reasons used to justify immunities to public officials is applicable to private parties who, in private pursuits for their personal financial gains, deprive innocent victims of their constitutional rights.

ARGUMENT

NEITHER THE COMMON LAW, THE PURPOSES OF SECTION 1983, NOR PUBLIC POLICY JUSTIFIES AN EXTENSION OF THE DOCTRINE OF QUALIFIED IMMUNITY TO PRIVATE PERSONS.

It is settled law that private defendants, who, under color of state law violate the constitutional rights of an individual, are liable under 42 U.S.C. § 1983. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 931-32 (1982); *Dennis v. Sparks*, 449 U.S. 24, 27 (1981). The question presented here is whether private persons who deprive individuals of their federal rights are entitled to the qualified

immunity to which the state officials, who joined them in their unlawful conduct, may be entitled. As this Court recognized in *Owen v. City of Independence*, 445 U.S. 622, 635 (1980), quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976), "by its terms, § 1983 'creates a species of tort liability that on its face admits of no immunities.' . . . Rather, the Act imposes liability on 'every person' who, under color of state law or custom, 'subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any right, privileges, or immunities secured by the Constitution and laws.'" *Id.*, quoting section 1983.

In recognition of "the significance of the societal interest in compensating the innocent victims of governmental misconduct," this Court has been willing to afford immunities from a section 1983 action only under the most limited of circumstances. *Owen*, 445 U.S. at 653. To decide whether a party is entitled to an immunity, the Court looks at whether (1) there was a common law basis in tort for affording protection when the Civil Rights Act was enacted in 1871; (2) the immunity is consonant with the history and purposes of section 1983 actions; and (3) there exist strong public policy reasons that would require the Court to carve out an exemption from liability for the party who injures innocent citizens through the use of an unconstitutional state law. *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981); see also *Hafer v. Melo*, No. 90-681, slip op. (S.Ct. Nov. 5, 1991) at 7 (describing limited class of officials who are entitled to absolute or qualified immunities); *Owen*, 445 U.S. at 637-38 (same). Respondents cannot meet any of these requirements.

1. Private Persons Possessed No Immunities From a Suit of This Kind at Common Law.

There is no historical basis for a general common law immunity for private persons from torts arising out of the unlawful exercise of governmental power. *Duncan v. Peck*, 844 F.2d 1261, 1264 (6th Cir. 1988); see *Jones v. Preuit & Mauldin*, 808 F.2d 1435, 1441 (11th Cir. 1987). The qualified immunity afforded by this Court's decisions to some government actors accused of the wrongful exercise of government power is based on "objective

reasonableness," a standard applied as a matter of law. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982) ("defining the limits of qualified immunity essentially in objective terms"); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) ("subjective beliefs about the [challenged conduct] are irrelevant"). At common law, private persons accused of wrongful conduct could never invoke an immunity as a matter of law, and thus enjoyed no immunity analogous to the qualified immunity now afforded to government actors. *Duncan, supra*.

At common law, however, private persons who were sued for malicious prosecution and, in some jurisdictions, wrongful attachment, had a limited affirmative defense of good faith, based on subjective factors, where the defendants, without malice, had probable cause to believe that they had a right to undertake actions that were ultimately shown to be unlawful. W. Prosser and W. Keeton, *The Law of Torts*, §§ 119, 120 (5th Ed. 1984); see also 1 F. Harper, F. James, Jr., O. Gray, *The Law of Torts*, § 4.8 n.5 (2d Ed. 1986) (describing the "little uniformity" across jurisdictions, concerning liability for wrongful attachment). Nonetheless, the existence of this subjectively-based defense, which was available only for some of the analogous types of tort violations giving rise to section 1983 liability, and only in some jurisdictions, does not provide any reason to create an immunity for all private defendants, irrespective of the underlying contexts or jurisdictions in which section 1983 claims may arise. See *Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (discussing the unsuitability of tort-by-tort approach, and rejecting it in favor of an "across the board" general principle). Moreover, as this Court counseled in *Anderson*, it has

never [been] suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law. That notion is plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official

action.

483 U.S. at 645. Because there was no general common law immunity for private persons for torts involving their participation in unlawful governmental actions, and because the good faith subjective defense was available only for particular torts, in particular jurisdictions, Respondents are unable to meet the first burden of demonstrating that an immunity should be read into a statute which on its face allows for none because of a comparable common law immunity.

2. An Immunity For Private Persons Contravenes The Purposes of Section 1983.

"The central aim of the Civil Rights Act was to provide protection to those persons wronged by the '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Owen*, 445 U.S. at 650, citing *Monroe v. Pape*, 365 U.S. 167, 184 (1961), quoting *United States v. Classic*, 313 U.S. 299, 326 (1941). Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe*, 365 U.S. at 187. Section 1983 was designed to be a remedial statute, allowing private parties access to federal courts for unconstitutional wrongs perpetrated by state actors, including those who, like Respondents here, avail themselves of the power of state law.

This Court's precedents make clear that section 1983 provides for a cause of action against a private individual. *Lugar*, 457 U.S. at 937 (private parties may be charged with deprivation of the right when they act with or obtain aid from the state); *Adickes v. Kress & Co.*, 398 U.S. 144, 174 n.44 (1970) (plaintiff sought damages from the private actor alone and neither state nor state officials joined as defendants).

Nevertheless, if either an immunity, based on "objective reasonableness," or a good-faith defense, based on both subjective and objective factors, is afforded to private actors, the Court will, in essence, be granting an absolute immunity for all private

parties from suits for damages. The reason that this ruling would be the equivalent of absolute immunity, which is now accorded only to the President, judges, and prosecutors for conduct within the scope of their positions, *see Hafer*, slip op. at 7, is that it would be practically impossible for any plaintiff to show either that private actors knew or should have known of the wrongfulness of their conduct, or that reasonable persons in those persons' place would have known of the violation, with the possible exception of members of the bar. Unlike government employees, who receive training in the law related to their position, or legally-trained professionals, few, if any, private defendants will have any special knowledge of the areas of law which give rise to a deprivation of someone's federal rights. As a consequence, almost all private section 1983 defendants will be able to say that they had no idea that their conduct was, or would be considered later to have been, unlawful. For example, Respondent Cole could quite plausibly argue that he never imagined that the Mississippi statute was unconstitutional or that his conduct in relying on it was unlawful. Indeed, under a *Harlow-Creighton* standard, even the well-informed malicious person could take refuge in the probability that most reasonable people would not know that their conduct, cloaked in state law, violated someone's constitutional rights. *See Creighton*, 483 U.S. at 641. Thus, allowing a qualified or good faith immunity to private parties would, as a practical matter, eliminate any possibility of collecting damages from them.

In *Owen*, the Court recognized the potential for this outcome, stating that "many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense." 445 U.S. at 651. Just as in *Owen*, this Court should eschew any effort to create an immunity, whether based on subjective or objective factors, because either will essentially disembowel the force behind the statute and leave many innocent victims "remediless." *Id.* ("such a result should not be tolerated"). The absence of a damages remedy will create a disincentive for individuals "to seek vindication of those constitutional deprivations that have not previously been clearly defined." *Id.* at 651 n.33. The power of section 1983 is eroded with every immunity afforded or every category of person exonerated, because the panoply of potential defendants decreases and the chances of the

injured party being made whole reduced accordingly. *See id.* When Congress enacted remedial legislation with the scope of section 1983, it could not have intended for a cause of action to rest against only truly incompetent government actors and municipalities. Therefore, granting immunity would contravene, not support, the purposes of section 1983.

3. There Is No Public Policy Reason to Immunize Private Persons Acting for Their Own Gain Who Deprive Innocent Victims of Their Federal Rights.

This Court has taken a "functional" approach to immunities by examining "the nature of the functions with which a particular official or class of officials has been lawfully entrusted" and then evaluating "the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester v. White*, 484 U.S. 219, 224 (1988). The Court's decisions have been grounded in the nature of the government actor's individual responsibilities, rather than the specific status of the government actor. This approach, rooted in governmental functions and common law considerations of sovereignty and separation of powers, strongly suggests that private actors, with no job-defined governmental function, are not entitled to immunity. *See Owen*, 445 U.S. at 647-48; *Scheuer v. Rhodes*, 416 U.S. 232, 239 & n.4 (1974).

Although the Court has recognized the importance of granting government employees some level of immunity when they act in their official roles, no decision has afforded an immunity to private parties who utilize state power to deprive an individual of their constitutional rights. Even where private parties and government officials have conspired to deprive plaintiffs of their constitutional rights, this Court has refused to grant private actors immunity derivatively, on the theory that it was necessary to advance policies that justified granting the immunity to the government actor. *Dennis v. Sparks*, 449 U.S. 24, 29 (1981) ("Petitioner nevertheless insists that unless he is held to have an immunity derived from that of the judge, the latter's official immunity will be seriously eroded. We are unpersuaded.").

The Court has identified several reasons why government actors should be entitled to some form of immunity, none of which applies to private parties. These include: (1) shielding government actors from distracting lawsuits that will consume the time that should be devoted to their jobs; (2) removing any considerations that would deter government action or introduce inappropriate factors into the decisionmaking process of government actors; and (3) attracting qualified personnel to government. In *Forrester*, the Court summarized these justifications, noting that the potential for personal monetary liability may "create perverse incentives that operate to *inhibit* officials in the proper performance of their duties." 484 U.S. at 223 (emphasis in original). The Court explained that "[w]hen officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct." *Id.* Consequently, the Court concluded that this exposure to liability "may detract from the rule of law instead of contributing to it." *Id.*; *see also Owen*, 445 U.S. at 655-56 (personal liability will introduce unwarranted considerations into decisionmaking process, thus paralyzing governing official's decisiveness and distorting his judgment on matters of public policy); *Scheuer*, 416 U.S. at 240 (expressing concern over government actor's liability for merely performing duties of job, rendering officials overcautious and stymieing ability to attract qualified persons into public service); *Anderson*, 483 U.S. at 638 ("risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties"); *Harlow*, 457 U.S. at 814 (delineating "social costs" of litigation against public officials).

Where the Court has concluded "that overriding considerations of public policy nonetheless demanded that the official be given a measure of protection from personal liability," it has cautioned that those decisions were "not to be read as derogating the significance of the societal interest in compensating the innocent victims of governmental misconduct." *Owen*, 445 U.S. at 652-53. As the holding in *Owen* confirms, none of the policy reasons identified to support affording immunities to government

officials, acting in their official roles, is present here.

Unlike government officials, private parties do not face the split-second, ever present decisionmaking requirements of office and thus are not confronted with a constant threat of liability. *Scheuer*, 416 U.S. at 247; *Downs v. Sawtelle*, 574 F.2d 1, 15 (1st Cir. 1978). Unlike government officials, private actors do not face the risk of liability for merely performing the duties of their jobs. For example, although Respondents did not have to initiate the wrongful replevin action here, the county sheriff who took the state court's order to seize the cattle had to enforce the Mississippi replevin statute, or *he* would have been subject to liability for failure to perform his job. Cf. *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 844 F.2d 714, 722 (10th Cir. 1988) (failure to afford immunity places government contractor "between Scylla and Charybdis") (footnote omitted).

Similarly, the concern that government actors may consider inappropriate factors in their decisionmaking, such as their likelihood of being sued, does not exist in denying private actors immunity. On the contrary, the opposite incentive is presented: private parties *should* think twice before they undertake actions for their own financial gain that have the potential to unconstitutionally wrong someone, and they *should* be discouraged from taking refuge in or invoking state law for wrongful behavior. Furthermore, denying private parties immunity raises no policy concerns involving the ability of the government to attract qualified persons into public service. In short, none of the "social costs" present in *Harlow* is present here, and accordingly, contrary to the Fifth Circuit's reasoning, no anomaly results from affording government actors immunity, while denying private actors the same defense.

For many of the same reasons, the Court should reject the Fifth Circuit's conclusion that the need to shield citizens from monetary damages when they resort to processes which they believe to be valid, or have no reason to know are invalid, provides the rationale for affording Respondents immunity. The court below impermissibly sought to protect the ignorant, but nonetheless self-interested party, from any "unfairness" resulting from

invoking "presumptively valid state laws," and in doing so thereby shifted the burden of the wrongdoing to the harmed and innocent individual. The judiciary, however, may not graft immunities or defenses for private actors onto section 1983 to undermine, in piecemeal fashion, the determination made by Congress that innocent victims of constitutional wrongs should be afforded a remedy. See *Tower v. Glover*, 467 U.S. 914, 922-23 (1984).

In enacting section 1983, Congress made the basic choice to provide victims of constitutional wrongs, undertaken under state authority, a damages remedy. In *Owen*, the Court denied immunity in a suit by "the innocent individual who is harmed by an abuse of governmental authority" where a municipal entity whose employees committed the wrongs were personally immune. Just as in *Owen*, where the Court carefully distinguished the reasons for affording immunities to government actors, from the reasons for not affording immunity to municipalities, the Court here should find that there is no reason to preclude the victimized individual from seeking damages against a private actor who -- unlike a municipality that acts on the public's behalf -- wrongs an individual for personal gain. See *Owen*, 445 U.S. at 656-57. Because Respondents acted for their own personal gain, and thereby injured Petitioner, it is they, not Petitioner, who should bear the risk that the actions they chose to take, were found to violate the Constitution.

CONCLUSION

The judgment should be reversed and remanded for a determination of Petitioner's damages caused by Respondents' initiation of the unconstitutional replevin procedure.

Respectfully submitted,

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